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Nos. 00-1751, 00-1777, 00-1779

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

-and-

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

-and-

SENEL HERMAN TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN JEWISH COMMITTEE, *et al.* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici represent a broad spectrum of religious and religiously-affiliated organizations whose members' communities are precisely those that stand to benefit from programs such as the Ohio State Pilot Scholarship Program (hereinafter, the "Ohio Vouchers Program" or the "Program"), a program that allows for the use of publicly funded vouchers at private religious schools. *Amici* share the conviction that the Program, in its subsidization of religious education, constitutes a grave threat to the principles underlying the Establishment Clause. Therefore, with the written consent of the parties, the following organizations submit this brief *amici curiae* in support of affirmance of the decision of the United States Court of Appeals for the Sixth Circuit.

The American Jewish Committee ("AJC"), a national organization of over 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans. A staunch defender of church-state separation as the surest guarantor of religious liberty and a dedicated supporter of public schools, AJC opposes vouchers as both unconstitutional and bad public policy.

The Baptist Joint Committee on Public Affairs (the "BJCPA") is composed of representatives from various cooperating Baptist conventions and conferences. Because it deals exclusively with issues pertaining to religious liberty and church-state separation, the BJCPA limits its participation in this brief to the Establishment Clause issues. The BJCPA believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

1. Pursuant to United States Supreme Court Rule 37, counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief, and counsel states that no counsel for a party authored this brief in whole or in part. In addition, no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of the American Jewish community. Hadassah opposes any direct or indirect government financing of religious schools, because it endangers church-state separation and undermines the system of public education essential to a pluralistic democracy.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 13 national and 122 local Jewish community relations organizations, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake — along with an ethical imperative — in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state is an essential bulwark for religious freedom in the United States.

The National Council of the Churches of Christ in the USA ("NCC") is the nation's leading organization in the movement for Christian ecumenical cooperation. The NCC's 36 Protestant, Anglican and Orthodox member communions and denominations include more than 50 million persons in 140,000 local congregations in communities across the United States.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members in over 500 communities nationwide. Given NCJW's National Resolution which states, "Quality public education for all, utilizing public funds for public schools only," NCJW joins this brief.

The Union of American Hebrew Congregations ("UAHC") is the central body of the Reform Jewish Movement in North America, and the Central Conference of American Rabbis ("CCAR") is the organized rabbinate of Reform Judaism. The 900 congregations of the UAHC encompass 1.5 million Reform Jews, and the membership of the CCAR includes 1,700 Reform rabbis. The UAHC and CCAR have long urged Congress, the courts and local officials to support America's public schools and protect the separation of church and state and will continue to do so. In a 1998 resolution adopted by the CCAR, the Reform Movement vowed to "continue to support public education by giving high priority to educating our nation's children and instilling a sense of urgency about the challenges facing public education in our synagogues, in the larger community, and among our elected officials." According to a December 9, 2001 resolution adopted by the UAHC, "one of the most serious threats to our system of public education comes from those who support vouchers for use in private and parochial schools."

The United Church of Christ's Justice and Witness Ministries ("UCC") coordinates and implements the denomination's justice advocacy mandates on behalf of 1.4 million members in over 6,000 congregations in the United States and Puerto Rico. In the tradition of its Pilgrim forebears who brought community schooling and higher education to the colonies, the UCC's history includes the founding of numerous schools for freed slaves throughout the South during and after the Civil War. The UCC has historically worked to strengthen public schools and to oppose any measure that would weaken the nation's public education system. In 2001, the UCC's General Synod, its highest denominational governing assembly, called upon its members and congregations to work to safeguard public education as a basic and fundamental civil right.

INTRODUCTION

The Ohio Vouchers Program is a school voucher program in which a limited number of Cleveland City School District students selected through a lottery process, based in part on financial need, receive state tuition grants, or vouchers, for use at private secular or religious schools within the boundaries of the Cleveland district, or at public schools in adjacent suburban districts that have registered for the Ohio Vouchers Program and have been approved by the State Superintendent of Public Instruction. Depending on income level, students may receive vouchers of up to 90% of a participating school's tuition, which cannot exceed $2,500. *See* Ohio Rev. Code § 3313.974, *et seq.* In the 1999-2000 school year, 3,761 students received scholarships under the Program. Over 82% of the participating schools were religious, and more than 96% of the students enrolled in the Program used their vouchers for tuition at a religious school. Since the Program's inception in 1995, no public school in the adjacent suburban districts has ever participated.

The Ohio Vouchers Program was created in response to Cleveland's ailing public school system. However, despite its laudable goal of improving educational opportunities for a select group of students, the Program is a misguided effort both in policy and law. As a matter of policy, it fails to provide a practical long-term solution to the "educational crisis" in the public school system. Instead, the Ohio Vouchers Program substantially weakens the Cleveland public schools in the short and long term by diverting scarce financial and social resources from them to private schools, the bulk of which are religious, even though the vast majority of elementary school children in Cleveland continue to attend the admittedly sub-standard public schools. Indeed, the vast majority of the funding for the Program comes from a state program created to support Ohio's economically challenged public school districts, the Ohio Disadvantaged Pupil Impact Aid program. Those funds were intended to benefit Cleveland's public school system, but instead, are being diverted

to private schools, the vast majority of which are religious, through the Ohio Vouchers Program. Thus, for the students who are unwilling or unable to take advantage of the Program, the vouchers do nothing to improve the current condition of their schools and, in fact, do much to harm them.

Beyond its tendency to diminish, rather than improve, the quality of Cleveland's public schools, the Program violates bedrock principles embodied in the Establishment Clause. The Ohio Vouchers Program cannot be squared with well-established Supreme Court precedents that prohibit the unrestricted flow of public funds into the general coffers of pervasively religious primary and secondary schools. Moreover, due to incentives inherent in the Program that cause religious schools to participate, and secular schools not to participate, the Program is grossly skewed towards religious education and does not, as Petitioners claim, neutrally present families with a broad spectrum of options from which to choose. By touting its form, Petitioners have ignored the actual substantive effect of the Program, which is that of an impermissible direct subsidy of the religious missions of participating religious schools, and of impermissible State reliance on pervasively religious institutions to accomplish the important governmental goal of educating Cleveland's children.

Finally, the Ohio Vouchers Program results in excessive entanglement between government and religion that is destructive to religion. It is a widely accepted axiom that a natural side effect of government funding is government control. Although the religious schools choose to participate in the Ohio Vouchers Program to receive government funding in the form of tuition vouchers, the Court's affirmation of that choice would usher in a new relationship between government and religion, one that threatens the autonomy of all religious entities. Indeed, in order for a religious school to participate in the Ohio Vouchers Program, and thereby receive funding, it must adopt the non-discriminatory admissions policy promulgated by the Ohio legislature. A determination by this Court that the Program is

consistent with the Establishment Clause will destroy the wall that separates church and state, erected by the founders of our country not only to prevent government from advancing religion, but also to protect religion from the monitoring, direction and control of government agencies.

To be clear, *amici* oppose government programs that provide unrestricted public funds to religious institutions. Indeed, *amici* find it difficult to imagine any voucher program that siphons public funds to religious schools that would pass constitutional muster under the Establishment Clause. However, this case does not present for the Court the overall issue of the desirability or constitutionality of vouchers generally; rather, it is limited to the question of whether this particular voucher program is constitutional. As set forth below, the answer to that narrow question is no — the Ohio Vouchers Program is not constitutional, because the Program (1) results in the transfer of unrestricted funds to religious schools, (2) is not neutral and does not present a real choice, because it creates incentives for parents to send their children to religious school, and (3) has the primary effect of advancing religion.

SUMMARY OF THE ARGUMENT

The Ohio Vouchers Program violates the central tenet of the Establishment Clause by pouring government funds directly into the coffers of religious schools, while providing no restrictions on their use. As a result, government funds, in the form of tuition grants, will finance religious activities and have the primary effect of advancing religion. In that regard, the Ohio Vouchers Program is indistinguishable from the voucher program struck down by this Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The Sixth Circuit's holding in this case is entirely consistent with this Court's decisions regarding public assistance to religious schools. Indeed, this Court has never held that a state's direct and unrestricted funding of religious schools as extensive as that existing under the Program passes constitutional muster.

Moreover, the Ohio Vouchers Program is affirmatively skewed towards religion and offers no real choice among educational institutions. Despite the Program's purported facial "neutrality" and superficial inclusion of "choice," the undeniable effect of the Program is to advance religion by funneling tax dollars to pervasively religious schools. In contrast to other public assistance programs approved by this Court, the structure of the Ohio Vouchers Program has the inevitable effect of ensuring that the overwhelming majority of participating schools will be pervasively religious primary and secondary schools, thus requiring the vast majority of parents, in order to receive the tuition grants, to enroll their children in those pervasively religious schools. Indeed, the funding structure of the Ohio Vouchers Program exacerbates this restriction of choice by affirmatively creating financial incentives for parents to send their children to pervasively religious schools.

In the final analysis, the Ohio Vouchers Program, regardless of the issues of "neutrality" and "choice," is unconstitutional, because it is a direct, unrestricted subsidy of religious education by state government. The Program not only provides direct financial support of pervasively religious schools, but also mandates state involvement in the admissions policies of those religious schools.

Accordingly, the Ohio Vouchers Program, for numerous reasons, violates the tenets of the Establishment Clause; therefore, this Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I.

THE GOVERNMENT FUNDING OF THE OHIO VOUCHERS PROGRAM IS A DIRECT, UNRESTRICTED SUBSIDY OF RELIGIOUS EDUCATION.

The Ohio Vouchers Program violates a fundamental principle of the United States Constitution — that government shall not "use [ ] public funds to finance religious activities." *Rosenberger v. Rector & Vistors of the Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits government from making laws "respecting an establishment of religion," whether by " 'sponsorship, financial support [or] active involvement . . . in religious activity.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Com. of New York*, 397 U.S. 664, 668 (1970)). Pursuant to that constitutional mandate, this Court has unequivocally struck down programs that provided unrestricted state funding to pervasively religious primary and secondary schools. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-85 (1973) (finding unconstitutional government funding for the repair and maintenance of religious schools and the reimbursement of tuition for students attending those schools).

This Court has recognized that unrestricted aid to pervasively religious institutions such as the religious primary and secondary schools dominating the Ohio Vouchers Program poses grave constitutional problems. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (Court has found unconstitutional "programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid.") (citation omitted); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("Aid normally may be thought to have a primary effect of advancing religion when it

flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ."). Under the Ohio Vouchers Program, public funds in the form of grants will inevitably flow without limitation into the general coffers of religious schools to pay for any or all of the schools' functions, including religious instruction and worship. Thus, no matter how laudable the purpose, the Ohio Vouchers Program is unconstitutional, because it has the primary effect of financing religious indoctrination with state money. *See Norwood v. Harrison*, 413 U.S. 455, 466 (1973) ("The existence of a permissible purpose cannot sustain an action that has an impermissible effect.") (internal quotations and citation omitted).

A. The Sixth Circuit Properly Held the Ohio Vouchers Program Unconstitutional Under *Nyquist*.

In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court struck down a New York program that allowed low-income parents with children attending certain primary and secondary private schools, including private religious schools, to receive partial reimbursement of their tuition bills from the state. *See Nyquist*, 413 U.S. at 780. Like the Ohio Vouchers Program, the overwhelming majority of the schools participating in the program were "religion-oriented," and the aid was technically provided to the parents rather than the schools. *See id.* at 774, 780. Pointing out that no attempt had been made to ensure that the public aid supported only secular functions of the schools, the *Nyquist* Court stated: "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780, 783. The program was found unconstitutional, notwithstanding the state's contention that the funds did not constitute "direct" state aid because the money was actually disbursed (as reimbursement) to the parents who

then were free to use that money as they wished.[2] *See id.* at 781-86. The manner by which the aid was provided to the schools, the Court held, was not dispositive but "only one among many factors to be considered." *Id.* at 781. The Court ultimately viewed as controlling the "substantive impact" of the program, rather than the route by which the aid traveled. *Id.* at 786. The impact of the program, the Court said, was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

As the Sixth Circuit properly held, the Ohio Vouchers Program is in all material respects indistinguishable from the program in *Nyquist*. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 958 (6th Cir. 2000). As in *Nyquist*, an overwhelming majority of participating Ohio schools are religious, and no attempt has been made to restrict the use of state funds in the schools for secular purposes only. *See Simmons-Harris*, 234 F.3d at 958-59. Indeed, given the overarching religious mission of those schools, it is doubtful that such use restrictions could ever be imposed in a meaningful way. *Compare Nyquist*, 413 U.S. at 774 (noting that the Court did not "think it possible within the context of . . . religious-oriented institutions to impose [restrictions on payments to secular uses]"). As a direct result of the Ohio Vouchers Program, the bulk of the $11.2 million in aid appropriated for the Program by the Ohio General Assembly for the 1999-2000 school year was channeled to pervasively religious institutions to be used for any and all purposes, including religious purposes. And, during that school year, 3,632 Cleveland school children (over 96% of Program participants) received religious instruction — and indoctrination — at state expense. *See Simmons-Harris*, 234 F.3d at 959. The Sixth

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2. Consistent with its approach of evaluating the substance, and not merely the form, of aid programs, this Court has subsequently treated *Nyquist* as an example of "direct transmission of assistance from the State to the [parochial] schools . . . ," despite the "reimbursement" aspect of the plan challenged therein. *E.g.*, *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

Circuit, therefore, properly found the Ohio Vouchers Program unconstitutional, because it "involves the grant of state aid directly and predominantly to the coffers of the private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives, and themes into all facets of their educational planning." *Id.* at 960-61.

B. Recent Establishment Clause Jurisprudence Reaffirms *Nyquist*'s Prohibition Against Unrestricted State Funding of Pervasively Religious Schools.

This Court's decisions subsequent to *Nyquist* have repeatedly affirmed the continued vitality of *Nyquist*'s holding. Indeed, although the Court has since approved certain forms of limited state aid to religious schools, in each instance, the Court has taken pains to distinguish *Nyquist* from the case at hand. *See, e.g., Mueller v. Allen*, 463 U.S. at 396 n.6 ("genuine tax deduction" for tuition, textbook and transportation expenses incurred in sending children to schools, including religious schools, was permissible, whereas the "outright grants to low-income parents" of *Nyquist* were not).

In recognition of *Nyquist*'s prohibition against unrestricted state subsidies for religious education in primary and secondary schools, this Court has found significant in subsequent challenges to school assistance programs that little or no government funds ever reach the coffers of religious schools. For example, in *Mueller*, this Court upheld a program whereby the parents of any child in Minnesota attending either public or private schools could claim a deduction from gross income for a portion of their expenses for tuition, textbooks and transportation. Because the program in *Mueller* involved tax deductions, no government funds were transferred at all, and thus, no government funds ever reached the coffers of religious schools. This Court recognized the importance of the fact that the *Mueller* program involved a tax deduction rather than the direct flow of government funds to the schools, stating that "[o]ur decisions consistently have recognized that traditionally

legislatures have especially broad latitude in creating classifications and distinctions in tax statutes in part because the familiarity with local conditions enjoyed by legislators especially enables them to achieve an equitable distribution of the tax burden." *Id.* at 396 (internal citations and quotations omitted).

Likewise, in *Mitchell v. Helms*, 530 U.S. 793 (2000), this Court's most recent ruling on the subject of public assistance to private religious schools, both the plurality and the concurrence reaffirmed *Nyquist*'s prohibition against unrestricted government money flowing into the coffers of religious schools. The plurality stated that "we have seen special Establishment Clause dangers . . . when *money* is given to religious schools directly. . . ." 530 U.S. at 818-819 (internal citations and quotations omitted) (emphasis in original). The concurrence similarly noted "[t]his Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." 530 U.S. at 843 (O'Connor, J., concurring) (internal citations and quotations omitted). In *Mitchell*, this Court upheld a program under Chapter 2 of the Education, Consolidation and Improvement Act of 1981, which provided educational materials such as library books and computers to qualifying public and private schools. The program in *Mitchell* contained the following safeguards to ensure that no unrestricted funds flowed directly to religious private schools: (1) the program provided that all of the materials provided to the schools had to be secular, neutral, and nonideological; (2) the program prohibited the schools from using the aid for religious worship or instruction and required all private schools to agree in writing that they would use the aid provided only for secular purposes; (3) the aid was only supplemental — it did not supplant funds from non-government sources; and (4) the program provided that private schools could not acquire title to the educational materials provided by the program. Those safeguards were crucial to both the plurality and concurring opinions in *Mitchell*, because they prevented the unrestricted flow of funds to religious

institutions. None of those safeguards is present in the Ohio Vouchers Program.

Indeed, under the reasoning set forth in the *Mitchell* concurrence, the Ohio Vouchers Program bears all the hallmarks of a violation of the Establishment Clause. The Program contains no requirement that the aid be used only for secular purposes, nor does it require participating schools to certify that they will not use the aid for religious purposes. Instead, the Ohio Vouchers Program provides unrestricted government funding for participating religious schools.

It is undisputed that religious teachings permeate the educational activities undertaken by the religious schools participating in the Ohio Vouchers Program. The handbooks and mission statements of the participating religious schools "reflect that most believe in interweaving religious beliefs with secular subjects" requiring, for example, that "all learning take place in an atmosphere of religious ideals." *Simmons-Harris*, 234 F.3d at 949. Given the degree to which religion is a part of the fabric of the teachings of the participating religious schools, there can be no doubt that the Ohio Vouchers Program funds are actually being diverted in large part to support religious activities. Under the Program, nothing prevents voucher funds from being used to buy religious texts, repair buildings used for religious purposes, pay for theology teachers, or sponsor religious speakers, to name a few examples. The lack of a secular content restriction alone should render the Ohio Vouchers Program unconstitutional. *See Mitchell*, 530 U.S. at 840 (stating that this Court's decisions "provide no precedent for the use of public funds to finance religious activities") (O'Connor, J., concurring) (internal quotations omitted); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (holding unconstitutional a statute that authorized federal grants to universities to be used for the construction of buildings to the extent that the secular content restriction in the statute expired after 20 years).

Moreover, unlike the program at issue in *Mitchell*, the Ohio Vouchers Program does not merely provide supplemental aid to religious schools for programs or materials that those schools would otherwise not have provided. Rather, the Ohio Vouchers Program supplants private funds with state money by providing the religious schools with tuition money that the schools could only receive from private sources, absent the existence of the Program. The funds provided by the Ohio Vouchers Program are completely unrestricted, whereas the supplemental aid provided by the *Mitchell* program by its nature limited the uses to which it could be put. In addition, the Ohio Vouchers Program provides at least some parents who would not otherwise send their children to religious schools with a financial incentive to do so. In this respect, as discussed more fully in Point II below, the Ohio Vouchers Program is not truly neutral. All these characteristics distinguish the Ohio Vouchers Program from the program at issue in *Mitchell* and inescapably lead to the conclusion that the Ohio Vouchers Program is unconstitutional.

In *Agostini v. Felton*, 521 U.S. 203 (1997), another recent ruling on the subject, this Court rejected an invitation to overrule *Nyquist*'s prohibition against state tuition grants and unrestricted subsidies for religious education in primary and secondary schools. In upholding the constitutionality of providing remedial education services, pursuant to Title I of the Elementary and Secondary Education Act of 1965, through public school teachers teaching on parochial school grounds, the majority specifically distinguished the program at issue in *Agostini* from the program in *Nyquist*, pointing out that "[n]o Title I funds ever reach the coffers of religious schools." *Id.* at 228. The aid provided by the program at issue in *Agostini* was also clearly supplemental to the services normally provided by the religious schools. In so finding, this Court explained, "Title I services are by law supplemental to the regular curricula. . . . [and] do not, therefore, relieve sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 228 (internal quotation and citations omitted); *see also Zobrest v.*

Catalina Foothills Sch. Dist., 509 U.S. 1, 10, 12 (1993) (holding that the government's provision of an interpreter to a deaf student attending a religious school was not unconstitutional because "no funds traceable to the government ever find their way into sectarian schools' coffers" and because the school "is not relieved of an expense that it otherwise would have assumed in educating its students").

In fact, in all of the school assistance programs upheld by this Court in the face of Establishment Clause challenges, "no more than a minuscule amount of aid awarded under the program[s]," if any, was "likely to flow to religious education." *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 486 (1986); *see also Agostini*, 521 U.S. at 226 (remedial instruction program upheld where there was no reason to believe that publicly-funded teachers would attempt "to inculcate religion in students"); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (program upheld where "ample safeguards" existed to ensure that reimbursements would cover only secular services). The Ohio Vouchers Program, in contrast, does nothing to preclude — and much to ensure (*see infra* at 26) — the likelihood that a substantial portion of the government funds appropriated will be used by religious schools to pay the salaries of clergy and other religious instructors, and to purchase Bibles and other religious texts.

In sum, no Supreme Court opinion has ever upheld the constitutionality of a program that provides such direct, substantial, unrestricted and widespread governmental support to the religious mission of private elementary and secondary faith-based schools as does the Ohio Vouchers Program. Therefore, the Sixth Circuit properly held the Ohio Vouchers Program unconstitutional under *Nyquist* and its progeny.

II.

THE OHIO VOUCHERS PROGRAM IS NOT NEUTRAL WITH RESPECT TO RELIGION, BECAUSE ITS PARTICIPANTS LACK MEANINGFUL CHOICE.

In assessing whether a statute is neutral for purposes of an Establishment Clause analysis, this Court has consistently found that context is as important as the face of the statute. *See, e.g., Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994). Even if a "challenged statute appears to be neutral on its face, [this Court] ha[s] always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Bowen*, 487 U.S. at 609. Consistent with this view, this Court's recent jurisprudence has emphasized the importance of meaningful choice in evaluating the neutrality of a government-sponsored program, stressing the significance of "neutrality and private choice, and their relationship to each other." *Mitchell*, 530 U.S. at 810. Thus, while facial neutrality is an important "index of secular effect," it may not trump "empirical evidence that religious groups will dominate" as beneficiaries of the challenged program. *Widmar v. Vincent*, 454 U.S. 263, 275 (1981).

To the extent that the Ohio Vouchers Program is facially neutral, in that it permits both religious and nonreligious schools, and public and private schools, to participate, a cursory glance beneath the surface of the statute demonstrates that the Program is "neutral" only in the most formal sense. In fact, the Ohio Vouchers Program is "skewed towards religion," *Witters*, 474 U.S. at 488, because it constrains the choices of voucher recipients to such a degree that government subsidization of religious indoctrination will inevitably result.

A. The Ohio Voucher Program's Funding Structure Ensures That the Range of Choices Will Always Be Limited Primarily to Religious Schools.

The Program's funding structure ensures that religious schools will dominate the universe of options available to voucher recipients,[3] because the Program's grant of tuition is too low to meet the basic financial needs of virtually all secular schools, private or public.[4] With respect to private schools, by statute, the State caps a participating school's tuition at a mere $2,500 per pupil, *see* Ohio Rev. Code § 3313.978(C), an amount wholly insufficient to satisfy the budgetary requirements of the vast majority of nonreligious private schools. As evidenced by the 1999-2000 roster of participants in the Program, very few secular private schools

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3. Petitioners' reliance on the Community Schools, a system of independently chartered public schools, as a nonreligious alternative to the Ohio Vouchers Program is misplaced, because the two programs are entirely separate and cannot be considered together. As the Sixth Circuit properly found, the Program was "enacted as a complete program in the Ohio Revised Code," *Simmons-Harris*, 234 F.3d at 958, and is independent and distinct from "the Community Schools program [which] is codified in its own chapter." *Id.* at 958. Moreover, private schools, by statute, may not participate in the Community Schools Program, *see* Ohio Rev. Code §§ 3314.01, *et seq.*, rendering the Community Schools program entirely irrelevant in the context of any discussion concerning meaningful choice under the Ohio Vouchers Program. Therefore, any discussion of the Community Schools program here is irrelevant on either statutory or practical grounds.

4. The Court's refusal in *Mueller* to consider the extent to which certain classes of citizens took advantage of the options available to them under the challenged law, *Mueller*, 463 U.S. at 401, does not in any way preclude this Court from considering evidence that the universe of options available to parents and schoolchildren under the Ohio Vouchers Program is heavily skewed in favor of religious education. As the district court explained, "determining whether an aid recipient has *neutral options* available under a program is not the same as probing how the recipient has chosen to exercise those options." *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 852 (N.D. Ohio 1999) (emphasis added).

are willing to set their tuition at or below the statutory cap, resulting in an educational pool dramatically skewed in favor of parochial schools. The religious schools' domination of the institutional roster is therefore not mere coincidence.

Even more significant is the enormous financial disincentive that the Program poses for Ohio's own public schools. The Ohio State system of public school funding requires virtually all school districts to rely primarily upon local tax contributions, derived from local property and income taxes, to make up the bulk of their financing for the academic year. *See* Ohio Dept. Taxation, Mike Sobul, *Property Taxation and School Funding* (May 2000), http://www.state.oh.us/tax/Publications/trs001.pdf. Indeed, local sources of funding may amount to more than 90% of the district's entire budget. *See, e.g.*, Ohio Dept. Educ. District Profile for Cuyahoga Heights (1999-2000), http://www.ode.state.oh.us/reportcard01/county_files/rc_cuyahogaco.htm (hereinafter, "District Profile for __"). Predictably, the Ohio school districts' extreme dependence on local property and income taxes inexorably results in wide disparities in funding from district to district: communities with high property valuations and rates of income generate significant revenue for their school districts; communities with low property valuation and low rates of income generate significantly lesser amounts of revenue for education.[5] *Compare, e.g.*, District Profile for Cuyahoga Heights *with* District Profile for Cleveland City. For its part, the State

5. This difference is particularly striking when comparing the school budgets of Cuyahoga Heights, a suburb of Cleveland, and that of Cleveland City. For the 1999-2000 school year, Cuyahoga Heights had available, from local taxes and state and federal sources, a total of $16,235 per pupil in school funding. Of that amount, $14,751, or 90.9 % of the district's total funding, was derived from local taxes. By contrast, Cleveland had available a total of $8,187 per pupil — nearly *half* the amount available in adjacent Cuyahoga Heights — of which only a scant $2,918 per pupil was generated by local taxes. *Compare* District Profile for Cuyahoga Heights *with* District Profile for Cleveland City.

contributes to each district's budget and attempts to rectify the funding inequity by providing a greater amount of state funds to the less affluent school districts. *See* Ohio Rev. Code §§ 3317.012, 3317.0212, 3317.022. However, the State's increased funding of less affluent school districts does not come close to equalizing the funding imbalance.[6]

It is a foregone conclusion, therefore, that no Cleveland suburban public school — or any Ohio public school adjacent to the Cleveland district — will ever participate in the Ohio Vouchers Program, because the amount of funding provided by the Program on a per pupil basis will never equal the amount of funding, on a per pupil basis, generated for local students by local taxes. By statute, the Ohio Vouchers Program provides $2,500 for each voucher student, plus an amount equal to the participating district's per pupil allotment from the State. *See* Ohio Rev. Code §§ 3317.03(I)(1), 3327.06, 3317.08(A)(1). Because the more affluent school districts adjacent to the Cleveland City School District pay for the cost of educating their students primarily with local funding generated from local taxes, funding from the State accounts for a relatively small portion of virtually every school district's budget. Therefore, the amount of state funding per voucher student falls well short of the amount the district normally receives and spends per student.

For example, according to Ohio Department of Education statistics for the 1999-2000 academic year, the Cuyahoga Heights school district generated $14,751 per pupil in local funds, $1,385 per pupil in state funds, and $99 in federal funds. *See* District Profile for Cuyahoga Heights. If the Cuyahoga Heights school district were to accept voucher students, the district would receive a mere $3,885 per voucher student ($2,500

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6. Federal funds also contribute to each district's overall budget. However, federal funds only constitute a small percentage of the total financing package.

in tuition from the Program, plus $1,385 from the State).[7] As a result, the State would effectively require the Cuyahoga Heights school district to budget for a deficit of $12,350 per voucher recipient.

The Program, therefore, would force each participating district to dilute its funding pool, resulting in fewer local tax dollars being available on a per pupil basis as more voucher students are added to the district's student population. Indeed, the Program requires participating schools to enroll, at a minimum, ten voucher students per class (grades K-3) or at least 25 voucher students in all classes offered (grades K-8). *See* Ohio Rev. Code § 3313.976(A)(5). Assuming that the Cuyahoga Heights school district accepted the statutory minimum of 25 voucher students, the district would be required to dilute its entire school budget by $308,750. The Ohio Vouchers Program would therefore cause each participating district to suffer an enormous dilution of its school funding pool. Certainly, considering the already critical state of many of the Ohio State schools, no "healthy" school district would accept students under the Program if such action would reduce overall per pupil spending. Accordingly, no adjacent school district has chosen, or will ever choose, to shoulder the additional cost of educating voucher students.

The amount of the tuition grant under the Program is so low that not even the ailing school districts in Cuyahoga County, including Cleveland itself, would, hypothetically, be able to afford to take voucher students without diluting the available funds for students within the district. The irony of this situation is palpably clear. For the 1999-2000 academic year, Cleveland's total school funding per pupil amounted to $8,187. *See* District Profile for Cleveland City. Thus, it would not have been financially prudent for even the deteriorating Cleveland public schools to accept voucher students from an adjacent district for whom it would have received funding amounting to a mere

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7. The $99 in federal funds does not follow the voucher student.

$7,120 ($2,500 from the Program, plus $4,620 from the State).[8] Under these circumstances, no adjacent suburban public school is likely ever to participate voluntarily in the Ohio Vouchers Program.[9]

Religious schools, in comparison, do not face such financial disincentives from participating in the Ohio Vouchers Program, since they are often subsidized by the churches with which they are affiliated; have lower overhead costs, with members of the clergy often serving as teachers; and have the extra-economic goal of exposing potential adherents to a specific religious faith. Indeed, by and large, the tuition of religious schools is below $2,500 per pupil. *See* Senel Taylor Brief at 39 ("Average Catholic school tuition is $1,628 annually."); State Brief at 40 ("the [voucher] amount is actually *higher* than the tuition costs of most participating schools") (emphasis in original). Religious schools have every incentive to participate, because they may increase student enrollment and receive *unrestricted* government subsidies, while still preserving the central role of their respective religious faiths in their educational enterprise. *See, e.g.*, Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999); *see generally* Ohio Rev. Code §§ 3313.974, *et seq*. In sum, private religious schools are much more willing and able to set their tuition at or below the $2,500

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8. The Petitioners incorrectly assume that the State would contribute a fixed amount of approximately $4,500 in state funds to each school district, in addition to the $2,500 for each voucher student. *See* Senel Taylor Brief at 39 *and* Hanna Perkins Brief at 22. As discussed above, the State determines the amount of state funding based on the school district's funding from local taxes. Thus, in virtually all adjacent public school districts, the resulting state contribution will always be significantly lower than $4,500.

9. It should be noted that, although the Ohio Legislature could have mandated that adjacent public schools participate in the Program, it chose not to do so. *See DeRolph v. State*, 78 Ohio St. 3d 193, 210-11, 213, 677 N.E.2d 733, 745-47 (1997) (the State has ultimate control over Ohio's public schools). This suggests that the nominal inclusion of public schools was, in fact, merely a cosmetic addition to the statute.

cap, and are thus far more likely to participate in the Program than their secular counterparts.

The exceedingly low value of the tuition grants, relative to the tuition of secular schools, results in the over-participation of religious schools and the under- or non-participation of private and public secular schools, thereby constraining the institutional choices of voucher recipients. The Ohio Vouchers Program, therefore, has the inevitable effect, therefore, of promoting religious educational institutions and cannot be considered neutral with respect to religion.[10]

B. Unlike Other Programs Approved By This Court, The Ohio Vouchers Program By Its Structure Limits The Universe of Options Available to Participants.

Choice under the Program is constrained, even prior to the decision-making of individual parents and students, because, by statute, the institutional options of the student participants of the Program are limited to only those schools that participate in the Program. *See* Ohio Rev. Code §§ 3313.974(G), 3313.976(A),(C), 3313.978(A). Unlike the programs reviewed by this Court in *Mitchell*, *Agostini*, *Zobrest*, *Witters*, or *Mueller*, the Program's participants are not permitted to select among a "huge variety," *Witters*, 474 U.S. at 488, or a "broad [ ] spectrum" of options, *Mueller*, 463 U.S. at 397 (citation omitted). Instead, participants must select a school from a small, self-selected

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10. It is worth noting that initial participation in the Ohio Vouchers Program is limited to students in grades K-3. *See* Ohio Rev. Code §§ 3313.975, 3313.978. Once a student is enrolled in the Program, however, he or she is entitled to funding through the eighth grade. *See* Ohio Rev. Code § 3313.975. This provision of the Program effectively guarantees that student participants will receive between *six* and *nine* years of religious education at state expense. This Court has noted that such programs involving young children should be scrutinized more carefully, due to the impressionable age of the participants. *See, e.g., Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736 (1976).

group of overwhelmingly religious options. This Court has never approved of any program so restrictive of choice.

In *Witters* and *Zobrest*, the educational programs at issue provided government aid for use at "the educational institution of [the student's] choice," *Witters*, 474 U.S. at 488, "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* (internal quotation omitted); *see also Zobrest*, 509 U.S. at 10 (same) (internal quotations omitted). Under the *Witters* and *Zobrest* programs, the pool of educational institutions from which each student could choose was not limited by any strictures inherent in the programs or by any government incentive for the participants to undertake a religious education. *See Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10. In other words, the programs presented recipients with a real choice, since government funding was available to *any* eligible student attending *any* school anywhere.

By contrast, the Ohio Vouchers Program mandates that aid recipients attend a school among the limited number that participate in the Program. *See* Ohio Rev. Code § 3313.978(A). No "huge variety" or "broad [ ] spectrum" of nonreligious alternatives may exist under such circumstances, especially where, as discussed above, the vast majority of the schools, by virtue of the way in which the State has structured the Program, are religious. *See Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 397 (citation omitted). The Program is therefore entirely unlike the commonly cited example of a government employee donating his or her paycheck to a religious organization, wherein the employee has a distinct, independent possessory interest in the government funds and the unrestricted ability to use those funds for any purpose he or she chooses. Here, the vouchers can *only* be used as payment towards tuition and can *only* be redeemed at one of the Program's participating schools. This inherent dual restriction on the voucher's use collapses the degree of attenuation between the individual choice of parents and the direct subsidization of religion by the government.

The Ohio Vouchers Program is also vastly different from the programs recently evaluated by this Court in *Mitchell* and *Agostini*. As discussed above, *supra*, at pp. 12-15, the government aid at issue was reserved exclusively for secular purposes and could not be diverted to religious use. Here, there is no such limitation on the government funds. Indeed, under the Program, use of the voucher grants is completely *unrestricted* and will likely be applied towards religious indoctrination. Moreover, because funding under those programs only supplemented the school's budget and did not alleviate any educational expenses parents would have otherwise paid, they provided no financial incentives for parents to select any particular school for their children. Here, the vouchers absorb up to 90% of the cost of educating a child. Because most of the options available under the Program are religious in nature, the Program has the undeniable effect of encouraging parents, who would not otherwise select a religious education for their children, through financial incentives, to participate in the Program. As consistently noted by this Court, such financial incentives restrict an individual's free choice. *See, e.g., Agostini*, 521 U.S. at 231.

Indeed, the Program's funding scheme further constricts individual choice by creating additional financial incentives for parents to send their children to religious schools. Inasmuch as the Program is targeted towards children of low-income families, because the Program requires a parental contribution of ten percent of the lower of the school's rate of tuition or $2,500, *see* Ohio Rev. Code § 3313.978, many families would specifically send their children to religious educational institutions to avoid paying the relatively higher costs of the few private secular institutions participating in the Program, regardless of the parents' religious beliefs or those they wish to impart to their children. Thus, in order to escape the failing Cleveland public schools, many parents may compromise their own religious beliefs by sending their children to a school of a different faith.

Moreover, the sheer practical limitations in enrollment that each institution must maintain will ensure that most Cleveland schoolchildren participating in the Program will have no choice but to enroll in a private religious school. Of the 56 participating schools in the 1999-2000 roster, 82% were religiously affiliated. Even assuming that each participating school would accept the same number of students, the structure of the Program ensures that an overwhelming percentage of the tuition recipients will be enrolled in religious schools. Considering that religious schools generally can accept more voucher students than secular private schools, that percentage is guaranteed to be considerably higher. *See Simmons-Harris*, 234 F.3d at 959. The sheer enormity of the numbers of voucher students who would have no choice but to attend religious schools leads to the inescapable conclusion that the Ohio Vouchers Program is not neutral with respect to religion and actively fosters the advancement of religion.

The multi-layered restrictions of choice inherent in the Program ensure that governmental funds are inevitably directed towards religious institutions. The Program, therefore, advances religious indoctrination and violates the Establishment Clause.

III.

THE ULTIMATE EFFECT OF THE OHIO VOUCHERS PROGRAM IS TO UNDERMINE THE SEPARATION OF CHURCH AND STATE.

As this Court has consistently recognized, there are no "bright line" tests in Establishment Clause jurisprudence. *See Nyquist*, 413 U.S. at 761 n.5. "Neutrality" and "choice," therefore, are not dispositive of the question presented. *See Mitchell*, 530 U.S. at 844 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 253. Instead, those two factors are mere indicia of the crux of every Establishment Clause analysis: whether the challenged state action has the primary effect of advancing the aims of religious institutions. *See, e.g., Agostini*, 521 U.S. at 223; *Mueller*, 463 U.S. at 396. Here, it is undeniable

that the ultimate effect of the Program impinges on the foundation of the Establishment Clause — the separation of church and state.

As discussed above, the Ohio Vouchers Program invariably results in the provision of substantial, unrestricted government funds to the coffers of private religious schools. *Cf. Zobrest*, 509 U.S. at 10 ("[N]o funds traceable to the government ever find their way into sectarian schools' coffers."). Because the educational mission of those schools is inextricably intertwined with their religious mission, a substantial portion of the government funds expended under the Program will be used to pay for a full-range of religious activities, including religious instruction, training and prayer, and the construction and maintenance of facilities used for worship. As a result, the Ohio Vouchers Program effectively achieves exactly the sort of state involvement with religious institutions that the Framers meant to foreclose, namely, the "use [of] essentially religious means to serve governmental ends, where secular means would suffice." *Walz*, 397 U.S. at 680 (1970) (Brennan, J., concurring).

Furthermore, the Ohio Vouchers Program necessarily results in the ongoing entanglement between church and state, since the Program calls for continuing surveillance of religious institutions by the government. While a religious school would typically be entitled to consider an applicant's religious affiliation in making an admissions decision, under the Program, participating religious schools are barred from making such determinations on the basis of religion. *See* Ohio Rev. Code § 3313.976(A)(4). Such implicit government policing of the operations and composition of religious schools promotes entanglement between church and state, and threatens the independence of those religious institutions by financially enticing them to participate in the Program. *See Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 53 (1947) (5-4 decision) (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.").

As Chief Justice Burger wrote: "Obviously a direct money subsidy [is] a relationship pregnant with involvement and, as with most governmental grant programs, c[an] encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ." *Walz*, 397 U.S. at 675.

The Establishment Clause was intended to safeguard religious liberty by ensuring that government would not involve itself in the affairs of religious institutions, and this principle finds no clearer statement than in the words of James Madison in his *Memorial and Remonstrance*:

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. . . . Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body.

If the Ohio Vouchers Program, with its direct financial support of religious schools and its involvement of the government in the operation of the participating religious schools, survives Establishment Clause scrutiny, the separation between church and state that is among the founding principles of this country will be all but destroyed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit in favor of the Respondents.

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